IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No.1342 OF 2003

in

SPECIAL CIVIL APPLICATION No.6441 OF 2003

with
LETTERS PATENT APPEAL No.1404 of 2003
in
SPECIAL CIVIL APPLICATION No.5242 2003

with
LETTERS PATENT APPEAL No.1409 of 2003
in
SPECIAL CIVIL APPLICATION No.4596 OF 2003

with
LETTERS PATENT APPEAL No.1410 of 2003
in
SPECIAL CIVIL APPLICATION No.6311 OF 2003

with
LETTERS PATENT APPEAL No.1411 of 2003
in
SPECIAL CIVIL APPLICATION No.6039 OF 2003

with
LETTERS PATENT APPEAL No.1412 OF 2003
in
SPECIAL CIVIL APPLICATION No.4627 OF 2003

with
LETTERS PATENT APPEAL No.1413 OF 2003
in
SPECIAL CIVIL APPLICATION No.5756 OF 2003

with
LETTERS PATENT APPEAL No.1414 OF 2003
in
SPECIAL CIVIL APPLICATION No.4809 OF 2003

with
LETTERS PATENT APPEAL No.1099 OF 2004
in
SPECIAL CIVIL APPLICATION No.5242 OF 2003

with
LETTERS PATENT APPEAL No.1485 OF 2004
in
SPECIAL CIVIL APPLICATION No.5551 OF 2003

with
LETTERS PATENT APPEAL No.1424 OF 2003
in
SPECIAL CIVIL APPLICATION No.4692 OF 2003

with
SPECIAL CIVIL APPLICATION No.5934 OF 2003

with
SPECIAL CIVIL APPLICATION No.1784 OF 2004

with
SPECIAL CIVIL APPLICATION No.3557 OF 2004

with
SPECIAL CIVIL APPLICATION No.3558 OF 2004

with
SPECIAL CIVIL APPLICATION No.3938 OF 2004

with
SPECIAL CIVIL APPLICATION No.282 OF 2004

with
LETTERS PATENT APPEAL No.18 OF 2004
in
SPECIAL CIVIL APPLICATION No.5755 OF 2003

with
LETTERS PATENT APPEAL No.19 OF 2004
in
SPECIAL CIVIL APPLICATION No.5753 OF 2003

with
SPECIAL CIVIL APPLICATION No.1748 OF 2004
with
SPECIAL CIVIL APPLICATION No.9048 OF 2004

with
SPECIAL CIVIL APPLICATION No.705 OF 2004

with
SPECIAL CIVIL APPLICATION No.706 OF 2004

with
SPECIAL CIVIL APPLICATION No.707 OF 2004

with
SPECIAL CIVIL APPLICATION No.918 OF 2004

with
SPECIAL CIVIL APPLICATION No.1670 OF 2004

with
SPECIAL CIVIL APPLICATION No.2471 OF 2004

with
SPECIAL CIVIL APPLICATION No.2742 OF 2004

with
SPECIAL CIVIL APPLICATION No.2743 OF 2004

with
SPECIAL CIVIL APPLICATION No.2914 OF 2004

with
SPECIAL CIVIL APPLICATION No.3516 OF 2004

with
SPECIAL CIVIL APPLICATION No.3668 OF 2004

with
SPECIAL CIVIL APPLICATION No.3936 OF 2004

with
SPECIAL CIVIL APPLICATION No.8228 OF 2004

with
SPECIAL CIVIL APPLICATION No.18286 OF 2003

with
SPECIAL CIVIL APPLICATION No.18287 OF 2003

with
SPECIAL CIVIL APPLICATION No.18288 OF 2003

with
SPECIAL CIVIL APPLICATION No.18289 OF 2003

with
SPECIAL CIVIL APPLICATION No.18290 OF 2003

with
SPECIAL CIVIL APPLICATION No.18291 OF 2003

with
SPECIAL CIVIL APPLICATION No.18292 OF 2003

with
SPECIAL CIVIL APPLICATION No.18293 OF 2003

with
SPECIAL CIVIL APPLICATION No.18294 OF 2003

with
SPECIAL CIVIL APPLICATION No.18295 OF 2003

with
SPECIAL CIVIL APPLICATION No.18296 OF 2003

with
SPECIAL CIVIL APPLICATION No.18297 OF 2003

with
SPECIAL CIVIL APPLICATION No.18298 OF 2003

with
SPECIAL CIVIL APPLICATION No.18299 OF 2003

with
SPECIAL CIVIL APPLICATION No.18300 OF 2003

with
SPECIAL CIVIL APPLICATION No.18301 OF 2003

with
SPECIAL CIVIL APPLICATION No.18302 OF 2003

with
SPECIAL CIVIL APPLICATION No.18303 OF 2003

with
SPECIAL CIVIL APPLICATION No.15 OF 2004

with
SPECIAL CIVIL APPLICATION No.18 OF 2004

with
SPECIAL CIVIL APPLICATION No.19 OF 2004

with
SPECIAL CIVIL APPLICATION No.7386 OF 2004

with
SPECIAL CIVIL APPLICATION No.283 OF 2004

with
SPECIAL CIVIL APPLICATION No.286 OF 2004

with
SPECIAL CIVIL APPLICATION No.287 OF 2004

with
SPECIAL CIVIL APPLICATION No.288 OF 2004

with
SPECIAL CIVIL APPLICATION No.290 OF 2004

with
SPECIAL CIVIL APPLICATION No.295 OF 2004

with
SPECIAL CIVIL APPLICATION No.423 OF 2004

with
SPECIAL CIVIL APPLICATION No.663 OF 2004

with
SPECIAL CIVIL APPLICATION No.702 OF 2004

with
SPECIAL CIVIL APPLICATION No.13440 OF 2003

with
SPECIAL CIVIL APPLICATION No.13873 OF 2003

with
SPECIAL CIVIL APPLICATION No.13964 OF 2003

with
SPECIAL CIVIL APPLICATION No.13756 OF 2003

with
SPECIAL CIVIL APPLICATION No.270 OF 2004

with
SPECIAL CIVIL APPLICATION No.1577 OF 2004

with
LETTERS PATENT APPEAL No.1368 OF 2003
in
SPECIAL CIVIL APPLICATION No.6312 OF 2003

with
LETTERS PATENT APPEAL No.1369 OF 2003
in
SPECIAL CIVIL APPLICATION No.6315 OF 2003

with
LETTERS PATENT APPEAL No.1370 OF 2003
in
SPECIAL CIVIL APPLICATION No.6314 OF 2003

with
CIVIL APPLICATION No.4152 OF 2004
in
SPECIAL CIVIL APPLICATION No.1577 OF 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

CHARULATA B PATEL - Appellant(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

==========

Appearance :
MR.YATIN OZA, SENIOR COUNSEL WITH MS SONAL R SHAH for Appellant(s) : 1,

MR.KAMAL TRIVEDI, ADDL. ADVOCATE GENERAL WITH MS.SANGEETA VISHEN, ASSISTANT GOVT. PLEADER FOR RESPONDENTS NO. ----MR.A.D. OZA, GOVERNMENT PLEADER for Respondent(s) : 1 - 4.

==========

CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE RAVI R.TRIPATHI
Date : 28/12/2005

ORAL JUDGMENT (Per:HONOURABLE MR.JUSTICE RAVI R.TRIPATHI)

All these matters involve common question, hence after hearing the learned advocates for the contesting parties, are decided by this common judgement.

2. The questions which arise for our consideration are;

(i) Whether the appellants/ petitioners appointed purely on ad hoc basis for a fixed tenure after a selection held pursuant to an advertisement by the respective section/ department are entitled to regularisation in substantive capacity by an order of the Court?

(ii) Whether continuance for a long time entitles an ad hoc appointee to regularisation without its initial recruitment being regularised through prescribed Selection Agency, by giving necessary relaxation in the matter of age and qualification prescribed under various provisions of the Recruitment Rules in absence of Recruitment Rules expressly providing for such relaxation?

(iii) What role the factors like legitimate expectations, equity, sympathy and human approach have to play while considering the claim of regularisation of ad hoc appointees on the ground that they had worked on the posts in question for quite some time?

3. The Letters Patent Appeals are filed against the judgement and order dated 25.11.2003 passed by the learned Single Judge disposing of a group of Special Civil Applications by a common judgement.

The appellants-original petitioners serving on ad hoc basis were appointed by order dated 06.04.2002 They were paid salary in the pay scale of Rs.4500-7000/-. Termination order dated 27th March 2003 was served to

them intimating that the services of the appellants would stand terminated with effect from the date mentioned in the order, i.e. the date on which the term of the appellants expired.

The appellants approached this Court by filing writ petitions contending that they were appointed after following the due procedure for recruitment as is required for regular appointments still the respondents being in the process of appointing these ad hoc employees on a fixed salary of Rs.3500/- for a fixed term. The termination was challenged and it was prayed that the same be quashed and set aside and the appellants be regularised in the services from the date of their appointment and they be paid salary as per the pay scale of junior pharmacist, i.e. Rs.4500-7000/-. By way of interim relief it was prayed that operation, implementation and execution of the order of termination dated 27.03.2003 be stayed and the respondents be directed to regularise the services of the petitioners from the date of their appointment and they be paid salary as per the pay scale of junior pharmacist, i.e. Rs.4500-7000/- and the respondents no.1 and 2 be directed not to appoint any other person on the post of the petitioners till regularly selected candidates are

available.

4. The matter was heard by the learned Single Judge and after considering the arguments of both the sides the learned Single Judge allowed the writ petitions in part. The respondents were directed to pay the pay scale of Rs.4500-7000/-, but the prayer to regularise them in service and to continue them in services till regularly selected candidates are available was refused.

5. These appeals are filed challenging the judgment and order of the learned Single Judge to the extent it is not favourable to the appellants. The challenge is mainly on the ground that though there is an urgent and acute need of the services of junior pharmacists, and no regularly selected candidates are available, not only that it is also not known as to when such regularly selected candidates would be available, still the learned Judge has not directed the respondents to continue the appellants in service as prayed for. It is also contended in these appeals that the appellants are discharging the same functions which are discharged by regular employees, that the posts held by the appellants are sanctioned posts, that the appellants possess all the requisite qualifications, for being appointed on

regular basis, therefore, the reliefs sought for ought to have been granted in toto.

6. The Letters Patent Appeals and the Special Civil supplications are contested by the respondents by filing reply contending various points which are considered at an appropriate place in this judgement.

7. The following facts are necessary for appreciation of the controversy involved in these matters.

Special Civil Application No.4596 of 2003 was the first matter to be filed. It was filed on 07.04.2003 and the first order was passed on 09.04.2003, issuing notice returnable on 28.04.2003. The learned Judge was pleased to order that status quo as on the date of the order be maintained, and if the petitioners are in service they be continued in service till the next date.

In response to the notice issued on 09.04.2003 on the returnable date, the learned Assistant Government Pleader appeared and on that day the Court was pleased to pass the following order:

> “Since the learned Assistant Govt. Pleader is

appearing in this matter it is not necessary for the petitioners to pay process for the purpose of service of the order of continuing interim relief, as it is the duty of the learned Assistant Govt. Pleader to inform his department."

The matter was adjourned to 06.05.2003 and ad interim relief was ordered to continue till the next date. On 09.05.2003 the learned Additional Advocate General appeared with the learned Assistant Govt. Pleader, and after hearing him the Court was pleased to continue the ad interim relief granted earlier till the next date of hearing.

The matter was thereafter listed on Board on various dates. On 13.08.2003 the Court was pleased to adjourn the matter to 14.08.2003 and ordered that ad interim relief granted earlier to continue till further orders. On 14.08.2003 the Court granted leave to join 'Gujarat Gaun Seva Pasandgi Mandal', through its Secretary as party respondent and issued notice to the newly added respondent returnable on 01.09.2003. The Court ordered that the ad interim relief granted earlier shall continue.

On 01.09.2003 the Court passed the following order:

> “Rule returnable on 04.09.2003. All these matters may be listed immediately after urgent admission Board, if any. Both the learned advocates have assured the Court that they will proceed with the matter on that day. Interim relief, if any granted earlier to continue till further orders.” ... ...”

As per the record next order was passed on 18.09.2003, which reads as under:

> “No one is present on behalf of the petitioners even in the second call. Hence S.O. To 29.04.2003. Office may notify this matter on a separate Board for final hearing.”

However, the matter could be heard and decided only on 25.11.2003.

These details are set out as the same will answer one of the important contentions raised on behalf of the appellants that they are in service for long and

therefore, length of service be taken into consideration while prayers made are granted/ rejected. It was on 09.04.2003 that the Court granted ex parte ad interim relief, it was continued upto 13.08.2003 being extended from time to time. On 13.08.2003 it was ordered to continue till further orders.

8. On 25.11.2003 the Court allowed the petitions to a limited extent. The Court was pleased to hold that:

> "(i) The petitioners have got no right to ask for regularisation of their services, as they have been appointed only on ad hoc basis and by way of tenure appointment;
>
> (ii)In case the Govt. decides to continue ad hoc appointment for the posts in question in view of the administrative exigencies, preference is to be given to those employees, who are already in service, and if services of any one of them are required to be terminated, the principle of "last come, first go" is required to be followed; and it will be open for the Govt. not to give fresh appointment orders on the expiry of the tenure orders.

> However, if the Govt. decides to give fresh appointment orders, the claim of one who is already in service is required to be considered, and preference is required to be given to one who is already in service, instead of replacing the present petitioners by other new ad hoc employees."

9. Besides, the Court passed a separate order in Special Civil Application No.4809 of 2003 and 12009 of 2003, which were filed by one Shri Vaghela Rajeshkumar Baldevbhai and Jigar Natvarlal Joshi respectively. It was submitted that these petitioners and 25 others, who had approached this Court earlier are not given fresh appointment orders.

The order reads as under:

> "So far as the aforesaid two petitioners, viz. Vaghela Rajeshkumar Baldevbhai and Jigar Natvarlal Joshi and the 25 aforesaid employees, who have not been given any fresh appointment orders, are concerned, the respondents shall reconsider their cases for giving them fresh appointment if they are forming part of the original 137 posts, for which recruitment is

made and if any of their juniors is continued, on the basis of the principle of “last come, first go”, appropriate orders may be passed as regards the aforesaid set of employees. The Govt. shall consider the aforesaid question appropriately for the purpose of giving fresh orders to this set of employees. The Govt. is accordingly directed to consider their claim and pass appropriate orders within a period of one month from today. Till the Govt. takes appropriate decision in connection with the above employees, status quo grated earlier shall continue. Simply because these petitioners have approached this Court and status quo order is granted, that itself should not be made the basis for not giving even tenure orders which are given to other employees. Ultimately, if these petitioners are continued, they will be entitled to regular scale prescribed for the post till their tenure is over. It is, however, clarified that it will be for the Govt. to review the situation at the time of the expiry of a tenure appointment whether to continue such employee by giving fresh appointment orders, but at that time, as stated

> earlier, the principle of “last come, first go” is required to be followed, as the one who is already in service is required to be preferred, instead of replacing such employee by way of another ad hoc employee.” (emphasis supplied)

So far as the claim of Shri Ketan G. Pandya, one of the petitioners in SCA No.5551 of 2003 is concerned the same was negatived. The Court passed the following order:

> “.. .. so far as the rest of the five petitioners who have already been given contractual appointment on a fixed period and fixed salary are concerned they are required to be placed in the regular scale, which they were already getting at the time of their initial appointment and they will be entitled to have such benefit of regular scale, which was given in the first appointment order till their tenure comes to an end or till their services are continued by the Government, as per the exigencies of the administration.”

The Court was also pleased to order that,

> “So far as rest of the 25 petitioners are concerned, ultimately, if they are given fresh appointment orders, as indicated in the earlier part of this order, they are also required to be given regular pay scale, which was given to them at the time of their initial appointment and their case are also required to be treated at par with the set of other five employees who are already serving at present in the fixed salary.”

The Court reiterated its earlier direction by saying that,

> “It is once again pointed out that even at the time when the tenure appointment comes to an end, it shall not be obligatory on the part of the State Government to continue the services of these ad hoc employees. However, in case the Government decides to make appointment of other ad hoc employees, naturally, at that time, the claims of these employees are required to be considered and the principle of 'last come, first go' is required to be followed so that it may not result in arbitrariness or heart-burn to the employees. However, it is clarified that in

> case the tenure appointment of the petitioners is over, they shall have no right to hold the posts or to claim fresh orders unless the eventuality pointed out earlier exists or they are replaced by other junior employees."

10. The petitioners being aggrieved of non grant/ refusal of part of the relief in Special Civil Application No.6441 of 2003 which was also disposed of by common judgement and order dated 25.11.2003 filed Letters Patent Appeal No.1342 of 2003. The same was admitted by the Division Bench (Coram: Bhavani Singh, C.J. & J.N. Bhatt, J.) on 16.12.2003. The Division Bench was pleased to pass the following order in Civil Application No.9161 of 2003 on 16.12.2003:

> "Subject to hearing the other side, till regularly selected candidates are available, services of petitioners be continued. Direct service is permitted."

The Division Bench (Coram: Bhavani Singh, C.J. & H.K. Rathod, J.) then passed order on 03.08.2004, which reads as under:

"Reply affidavit should have been filed by the Commissioner, Health, Medical Services and Medical Education (Health Division). Let it be done within two weeks, with copy to the appellants. Rejoinder, if any, be filed and matters posted on August 17, 2004."

After the order passed in Letters Patent Appeal No.1342 of 2003 in Special Civil Application No.6441 of 2003 on 16.12.2003 , other Letters Patent Appeals being No.1404 of 2003, 1409 of 2003, 1411 of 2003, 1412 of 2003, 1413 of 2003, 1422 of 2003 and 1423 of 2003 were moved and the same were admitted by order dated 26.12.2003 and the same were linked with Letters Patent Appeal No.1342 of 2003. In the respective Civil Applications filed in these Letters Patent Appeals, the Division Bench was pleased to issue rule and grant relief saying that,

"Subject to hearing the other side till regularly selected candidates are available services of the appellants-applicants be continued."

11. On 17.08.2004 the Division Bench passed the following order in Civil Application No.9161 of 2003:

> “Petitioners were appointed in para medical service (Class III) during 2001 while some others between 2002 to 2003. They claim regularisation, having been appointed through advertisement and process of selection. However, respondents submit that they were appointed on ad hoc basis on fixed terms and conditions. The petitioners submit that they are qualified as per recruitment rules, advertisement dated April 4, 2001 and gained experience by this time.
>
> It seems, selection process must have made some headway by this time. Therefore, it may not be just and proper to disengage the petitioners at this stage, more so when they are serving the respondents since 2001. Consequently, they will continue to hold the post against which they have been appointed and paid the pay scale of the post. Interim relief made absolute. Civil Applications are disposed of.”

The Division Bench was pleased to pass the following order in Letters Patent Appeal:

> “Notice to respondent no.4 returnable on September 28, 2004, to state by which time the final list of selection would be ready and placed before the Court in sealed cover for perusal. List the Appeal on September 28, 2004.”

12. Order dated 17.08.2004, by which Civil Application No.9161 of 2005 in Letters Patent Appeal No.1342 of 2003 and other Civil Applications were decided was challenged before the Hon'ble the Apex Court by filing Special Leave to Appeal (C) Nos.3694 to 3706 of 2004. In these petitions the Hon'ble the Apex Court vide order dated 01.02.2005 granted interim stay of order dated 17th August 2004. Later on these Special Leave to Appeals were disposed of by order dated 18.04.2005, which reads as under:

> “Leave granted.
>
> The challenge in these appeals is an interim order passed by the High Court in an appeal in effect staying the operation of the judgement

appealed from. The only reason that this Court had in turn stayed the operation of the interim order of the High Court was that no reasons were

given by the Division Bench in support of its conclusion. We are told that the appeals are now being heard before the Division Bench of the High Court. In that view of the matter, no useful purpose will be served in keeping these appeals alive. Accordingly, we continue the interim order passed by this Court till the disposal of the appeals by the High Court. It is expected that the appeals will be disposed of as expeditiously as possible. We make it clear that this Court has not expressed any view on the merits of the dispute between the parties. The appeals are accordingly disposed of."

13. After Letters Patent Appeal No.1342 of 2003 in Special Civil Application No.6441 of 2003 was admitted by the Division Bench (Coram: Bhavani Singh, C.J. & J.N. Bhatt, J.) on 16.12.2003 and interim protection was granted and continued directing the respondents to

continue the petitioners in service till regularly selected candidates are available, number of other petitions were filed being Special Civil Applications No.18262 of 2003, 18303 of 2003, 282 of 2004, 283 of 2004, 286 of 2004, 287 of 2004, 288 of 2004, 290 of 2004, 295 of 2004, 423 of 2004, 663, 702 of 2004, 705 of 2004, 706 of 2004, 707 of 2004, 918, 1670, 2471 of 2004, 2742 of 2004, 2743 of 2003, 2914 of 2004, 3516 of 2004, 3668 of 2004, 3936 of 2004, 15 of 2004, 18 of 2004, 19 of 2004, 7386 of 2004, 8228 of 2004 and 9048 of 2004 before the learned Single Judge. In all these matters the Court issued either 'notice' or 'rule' and granted interim relief on the same lines on which it was granted by the Division Bench.

On 13.09.2004 all these petitions were heard for interim relief and the learned Single Judge, after hearing the learned advocates for both the sides was pleased to pass an order, the relevant part of which reads as under:

> “Accordingly, by way of interim relief, it is directed that the petitioners' services shall be continued till regularly selected candidates are appointed and the petitioners shall be paid salary in the regular pay scale which was given

to the petitioners at the time of their initial appointment.

The petitions shall be listed for final hearing along with Letters Patent Appeal No.1342 of 2003 and connected matters. The second sets to be supplied by 10th October 2004."

14. Accordingly, Letters Patent Appeals No.1342 of 2003 in Special Civil Application No.6441 of 2003 with other Letters Patent Appeals and Special Civil Applications with Civil Application No.4152 of 2003 in Special Civil Application No.1577 of 2003 were notified before this Bench.

Mr.Y.N. Oza, the learned senior counsel for the appellants while opening his arguments submitted that by a Government Resolution No.KPA/1/ PR/ GR dated 27.07.1999 issued by the General Administration Department, Government of Gujarat has delegated its power of recruitment to the Gujarat Employees Service Commission/ Gujarat Staff Selection Commission, which later on came to be known as 'Gujarat Subordinate Selection Board'. He submitted that at the material time this Board was 'non functional' as it did not have the required members. That being so, the Government had

given a go by to the appointment rules in the matter of recruitment of para-medical staff, as no rules were framed. The submission made by the learned counsel Mr.Y.N. Oza is vehemently opposed and disputed by the learned Additional Advocate General. The Government Resolution dated 27-7-1999 is not placed on record. To ascertain the facts the Court asked the learned Additional Advocate General to place the said Government Resolution dated 27-7-1999 along with the Resolutions referred therein on record.

15. At this juncture the learned senior counsel for the petitioners/ appellants submitted that there are some other Letters Patent Appeals arising out of the same judgement and about 125 Special Civil Applications, raising identical questions may also be heard together as the judgement in these matters would govern their fate also. The office was directed to list all the matters, on learned senior counsel giving the numbers of the matters. Accordingly, these matters are listed before this Court.

After the Hon'ble the Apex Court disposed of the Special Leave Petitions by order dated 18th April 2005, the State Government moved Civil Applications for vacating interim

relief. The Civil Applications were heard. The Court disposed them of by order dated 20th April 2005.

16. Before we deal with the rival submissions made by the respective parties, the factual background which has a bearing on the controversy involved in the matter is set out.

On 21st March 1988 the State Government had issued a Resolution setting up a commission in the name and style of 'Staff Selection Commission'. It was assigned the work of recruitment of Class III staff and by doing that, Gujarat Public Service Commission (GPSC) was relieved from the task of recruitment of Class II. On 22nd November 1988 the State Government issued another Resolution modifying the earlier Resolution to an extent and the 'Staff Selection Commission' was named as 'Gujarat Karmachari Pasandgi Ayog' in Gujarati, and 'Gujarat Staff Selection Commission' in English. On 1st May 1990 the State Government issued yet another Resolution and re-named 'Gujarat Staff Selection Commission' as 'Gujarat Gaun Seva Pasandgi Mandal', with a view to avoid a confusion on account of 'similarity' in the name with Gujarat Public Service Commission and Gujarat Staff Selection Commission. In English it is

'Gujarat Subordinate Services Selection Board'. The State Government by a Resolution dated 15th October 1994 entrusted the work of recruitment of Class III cadre to the aforesaid Mandal, under the control of the Director of Accounts and Treasury.

In the year 1999 on 27th July 1999 the State Government issued a Resolution and entrusted the entire work of selection and recruitment of candidates for technical and non-technical cadres belonging to Class III to the Mandal.

This is the historical background so far as coming into being of the 'Gujarat Gaun Seva Pasandgi Mandal' (Gujarat Subordinate Service Selection Board) (hereinafter referred to as “Mandal” for brevity) is concerned.

17. In the year 2001, due to unfortunate earthquake an emergent situation arose. The Government in Health & Family Welfare Department, issued a Resolution on 13th March 2001, after obtaining concurrence of the Finance Department, and decided to fill up 433 para-medical poss, falling within the jurisdiction of the 'Mandal', on ad hoc basis, for a period of one year or till the regularly selected candidates are made available by the

Mandal, whichever is earlier.

Pursuant to that an advertisement was issued on 25th April 2001, inviting the applications for ad hoc appointment on various posts including Junior Pharmacist. A selection was held pursuant to the aforesaid advertisement. It is on 6th April 2002 that the appellant-petitioners in Letters Patent Appeal No.1369 of 2003 were engaged as Junior Pharmacists on purely ad hoc basis for the period of one year or till regularly selected candidates by 'Mandal' are made available, whichever is earlier in the pay scale of Rs.4500-7000/-. It was provided in the appointment order to give an undertaking that the appointee will abide by the terms and conditions of the appointment order and that one will not have any objection in respect of termination from the employment on expiry of specified period on ad hoc employment. Accordingly, every appointee executed such undertaking. On 22nd April 2002, the State Government in Health & Family Welfare Department, after obtaining concurrence of the Finance Department issued a Resolution extending the aforesaid ad hoc appointment for a further period of six months as period of one year indicated in the Resolution dated 13th March 2001 was to expire. Thereafter, on 6th February 2003, the State Government in Health & Family

Welfare Department issued another Resolution after obtaining concurrence of the Finance Department as regularly selected persons by the Mandal were not available and granted approval for effecting appointments of the ad hoc employees, on contract basis for a period of 11 months on fixed pay as per Schedule appended to the Resolution. That Schedule was amended by the subsequent Resolution dated 13th February 2003.

Thereafter, order was issued on 27th March 2003 terminating the services of the appellant-petitioners as well as others employed on ad hoc basis for a period of one year on the expiry of period of ad hoc appointment on 12th April 2003.

18. To challenge this order of termination dated 27th March 2003 the appellant-petitioners filed the subject petition on 7th April 2003, wherein the Court passed the first order on 9th April 2003 issuing notice returnable on 28th April 2003 and granted order of 'status quo', details of which are already set out in earlier part of this order. The order granted on 9th April of 'maintaining status quo' continued not only until the disposal of petition/s by the learned Single Judge by judgement and order dated 25th November 2003 but even thereafter as the

matter was carried in appeal and also to the Hon'ble the Apex Court.

Mr.Y.N. Oza, the learned Senior Counsel appearing for the appellant-petitioners submitted that all these matters involve a common question. He submitted that with some variation of date of appointment, date of serving or order of termination the facts are almost identical. He submitted that in the case of the appellant in Letters Patent Appeal No.1485 of 2004 arising from Special Civil Application No.5551 of 2003, the appellant-Hemlata Bavabhai Patel was initially appointed on ad hoc basis vide order dated 1st October 2001. The learned Senior Counsel appearing for the appellant-petitioners vehemently submitted that the appellant-petitioners are serving with respondents no.1 and 2, that the appellant-petitioners were appointed on ad hoc basis vide order dated 1st October 2001 after following due procedure for recruitment as is required for regular employees and were paid salary in the pay scale of Rs.5000 – 8000/-; that before expiry of the period of appointment the appellant was served with the impugned order of termination dated 27th March 2003 declaring that the services of appellant would be terminated with effect from 4th April 2003, the date on which the term of appointment was to expire.

19. The appellant also came to know that the respondents are in a process of re-appointing the appellant and other ad hoc employees on fixed salary of Rs.3500/- for a fixed term, and re-appointed the appellant along with other ad hoc Lab Technicians on fixed salary of Rs.3500/- vide order dated 19th April 2003.

The appellant, challenged the impugned termination and inter alia, prayed for regularisation and continuation of services till regularly selected candidate is made available by the Mandal and also to pay salary as per the pay scale of Rs.5000 – 8000/- as paid at the time of her initial appointment. The learned Senior Counsel submitted that the action of the State Government of terminating the services of the appellant and appointing her on ad hoc basis on fixed salary was most unfortunate. It is good that the learned Single Judge partly allowed the Special Civil Application vide judgement and order dated 25th November 2003 and granted certain relief to the appellant, such as, pay scale of Rs.5000 – 8000/-. But then the learned Single Judge did not grant other reliefs like regularisation of services of the appellant with all consequential and incidental benefits, to continue services of the appellant till regularly selected

candidate is made available by the Mandal, the appellant has to file this Letters Patent Appeal.

The learned Senior Counsel submitted that it is an admitted fact that there is urgent and acute need of Para -medical staff which includes Lab Technicians and it is also admitted fact that there is no regularly selected candidate available, that it is also not known as to when such candidates would be made available by the Mandal. In such a situation the learned Single Judge ought to have directed the respondents to continue the services of the appellant till regularly selected candidate is made available by the Mandal.

The learned senior counsel strenuously submitted that the appellant is discharging the same functions as are discharged by a regular employee and that the post of the appellant is a sanctioned post, besides the appellant fulfils all requisite qualifications and is thus, by all means eligible for being appointed as a regular employee, therefore, the services of the appellant should have been ordered to be regularised.

20. The learned senior counsel repeatedly submitted that though the learned Single Judge had taken note of the

fact that the post of the appellant is sanctioned one, that the appellant has been appointed to the said post after following due process of recruitment, required for appointing the candidates on regular basis; that the appellant is discharging the same duties as are discharged by a regularly appointed Lab Technician, that the regularly selected candidates by the Mandal are not available till date, that being so, the learned Judge ought to have directed the respondents to continue the services of the appellant till the regularly selected candidates are made available by the Mandal and should have directed the respondents to regularise the services of the appellants.

The learned Senior Counsel submitted that it is an admitted fact that it was in view of the urgent and acute need of the services of the Para-medical staff which included the Lab Technician and as no candidates duly selected by the Mandal were available, the Government vide Resolution dated 13th March 2001, decided to fill up 433 posts. He submitted that it is a well settled principle of law that, 'an ad hoc employee cannot be replaced by another ad hoc employee, and order to enforce this principle the learned Single Judge ought to have directed the respondents to continue the services of the

appellants till regularly selected candidates are made available by the Mandal.

The learned senior counsel submitted that the factum of the appointment of the appellant, which was made by the regular mode of recruitment and the factum that the appellant by all means is qualified to be appointed as regular employee as per the recruitment rules, and that the appellant is appointed to a 'sanctioned' post and that she is discharging the same duties that of a regular employee, the principle of equal pay for equal work and there being no justification for denying the claim of the appellant for regularisation and in the alternative to continue till regularly selected candidates are made available by the Mandal, should have been considered in its true perspective and should have been given due weightage while granting relief to the appellant-petitioners.

The learned senior counsel submitted that the Hon'ble the Apex Court has observed in number of decisions that the Government cannot shirk its responsibility of providing essential services which include services of para-medical staff on the ground of paucity of funds. He submitted that essential services cannot be provided without

continuing the appellant and other similarly situated persons in service. He also submitted that proposal of the State to keep the posts vacant on account of shortage of funds, should have been turned down with heavy hand. He submitted that once the sanctioned posts are to be filled in, then the claim of the appellant-petitioners could not have been denied and the resultant effect would have been to continue the petitioner in service till a regularly selected candidate is made available by the Mandal and also to consider the case of the petitioner for regularisation.

21. The learned senior counsel submitted that the learned Single Judge ought not to have held that it is not open for the State to keep the posts on which the appellant is serving, vacant and to wait for the arrival of the regularly selected candidates. He submitted that the learned Single Judge has erred in holding that the appellant and other employees cannot insist for their continuance even till regularly selected candidates are made available by the Mandal. He submitted that the learned Single Judge having held that the work in question is still in existence and the Government is in need of services of para-medial staff, like the appellants, it should not have been held that it is open

for the Government to keep the para-medical posts vacant because of paucity of funds. He submitted that these two things are diagonally opposite. The learned senior counsel submitted that when there is an acute and urgent need of services of para-medical staff the Government is duty bound to employ the required para-medical, Class III employees and that being so the appellant and all other similarly situated persons deserve not only to be continued in service till regularly selected candidates are made available by the Mandal but also deserve to be regularised with all consequential and incidental benefits.

The learned senior counsel submitted that allowing the Government to resort to the scheme of ad hoc employment is nothing but allowing the Government to exploit the desperate need of employment of the appellant and other similarly situated persons. He submitted that it is unfortunate that a vital issue like 'continuation in service of the appellant and other similarly situated persons till regularly selected candidates are made available by the Mandal', is left to the discretion of the Government. He submitted that this will cause not only further exploitation of the appellant and other similarly situated employees but would end up in pushing

these employees to the status of slaves of the Government who would be completely at the mercy of the Government. The learned senior counsel submitted that the policy of the Government is in sheer violation of the constitutional rights and privileges of the appellant and other similarly situated employees, which cannot be and ought not be tolerated.

22. The learned senior counsel submitted that for the same reasons for which the learned Single Judge granted the pay scale to the appellant and other similarly situated employees, he should have granted the relief of continuing the appellant and other similarly situated persons in service, till regularly selected candidates are made available by the Mandal.

The learned senior counsel reiterated that the appellant and other similarly situated persons have made out a good case for regularisation as the appellant and other employees were appointed to sanctioned posts, were recruited after following the procedure meant for regular employees and they were discharging the same duties as that of regular employees. He submitted that in that view of the matter the learned Single Judge ought to have granted the relief of regularisation.

23. Last but not the least the learned senior counsel submitted that this is a fit case in which reliefs not granted by the learned Single Judge are required to be granted by this Court to advance the cause of justice.

24. The learned senior counsel submitted that even when the Mandal was given the power to make recruitment, the Government was not denuded of its power to make recruitment and therefore, the recruitment of the appellant and other similarly situated employees by the Government is not irregular and the services of the appellant and all other similarly situated persons deserve to be regularised. The learned senior counsel submitted that as it is contended by the Government that the recruitment was made by the 'Government' and not by the 'Mandal' the same cannot be regularised, because it is not made by the authority to which the work of recruitment is assigned by the Government. He submitted that an authority which has delegated the power to another authority can always exercise the power delegated. In support of this submission the learned senior counsel relied upon the decisions of the Hon'ble the Apex Court in the matters of (i) **Godavari S. Parulekar, etc. (In Cr.A. Nos.142 to 149 of 1964); B.K.**

Khopkar and others (In Cr.A. Nos.225 to 227 of 1964), Appellants Vs. the State of Maharashtra (In all the appeals), respondent, reported in A.I.R. 1966 SC 1404, (ii) **Government of Andhra Pradesh & another Vs. Medwin Educational Society and others**, reported in (2004) 1 SCC 86, (iii) **Ishwar Singh Vs. State of Rajasthan and others,** reported in (2005) 2 SCC 334.

The proposition laid down in these decisions is well accepted. The Hon'ble the Apex Court has observed in para 6 in the case of **Godavari S. Parulekar, etc.** (supra),

> "Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself."

25. In the present case the Government entrusted the work of recruitment to the 'Mandal' for obvious reasons and the same are narrated by the learned Additional Advocate General in his submissions. That being so the object of this assignment or entrustment become apparent.

There is no question of the Government being denuded of the power to recruit. But then a Government always functions through its agencies and once such agency is created, it is in the fitness of things to allow that agency to discharge its functions. The act of the Government to make recruitment on ad hoc basis is explained from the submissions of the learned senior counsel himself. It was only on account of acute, urgent need that the Government had undertaken that task. The task was undertaken to meet the urgent need. The Government while so doing made it clear to the appointees right at the inception that their services are liable to be terminated as and when regularly selected candidates are made available by the Mandal or on expiry of the term of appointment whichever is earlier. In view of these glaring facts, the decisions of the Hon'ble the Apex Court have no application to the facts of this case.

The learned senior counsel next submitted that even in the cases where the Government is required to make appointment to certain posts in consultation with the GPSC, such appointment made by the Government without consulting the Commission (Public Service Commission) does not become invalid or illegal because the requirement of consultation with the Commission is held

to be 'directory' and not mandatory in nature. He submitted that applying the same analogy, recruitment which was otherwise to be made by the Mandal could be made by the Government. The requirement of making the appointment by Mandal be held to be directory in nature and not mandatory. That being so, the appointment made by the Government should be treated to be regular appointment. In this regard he relied upon a decision of the Hon'ble Apex Court in the matter of **State of U.P. Vs. Ram Chander Singh and others,** reported in (1989) 1 SCC 137.

The decision of the Hon'ble the Apex Court has no application to the facts of the case on hand inasmuch as in the present case an agency/ authority is created by the Government and work of recruitment is assigned to it. There is no reason for which that authority should be bypassed by the Government, more particularly when the Government had undertaken that task for a definite purpose of meeting the urgent need of the day and besides the appointees were also made known about the nature of their appointment, they knew in advance that their appointment is to last only for the period mentioned in the appointment order or till regularly selected candidates are made available by the Mandal, whichever is

earlier.

The learned senior counsel in support of his submission that the appellant and other similarly situated employees are discharging the same duties as that of regular employees, and they should be paid the same pay scale, relied upon a decision of the Hon'ble the Apex Court in the matter of **Dhirendra Chamoli and another Vs. State of U.P.** reported in (1986) 1 SCC 637. The question of equal pay for equal work does not survive in the matter as the learned Single Judge has already granted that relief to the appellant-petitioners.

26. The learned senior counsel next relied upon a decision of this Court in Special Civil Applications No.2843, 2919, 2924 and 2780 of 1991, with Special Civil Applications No.1971, 6909, 5872 and 2074 of 1988, with Special Civil Applications No.7331 and 7449 of 1990 with Special Civil Application No.2001 of 1989, in support of his submission that the services of the appellant and other similarly situated persons shall not be terminated until a regularly selected candidate is available.

27. Last, but not the least the learned senior counsel also relied upon a decision of the Hon'ble the Apex Court

in the matter of **Rajbinder Singh Vs. State of Punjab,** reported in JT 1988 (1) SC 31, whereby the Hon'ble the Apex Court was pleased to allow an ad hoc teacher to continue in service while the persons regularly selected by the Public Service Commission are appointed to the post.

28. The question of continuing ad hoc employees in service till regularly selected candidates are made available by the Mandal need not detain the Court any longer. In the considered opinion of this Court it is for the State to decide as to whether it is in need of the services of the ad hoc employees or not. It is for the State to decide as to whether to continue or not to continue the services of ad hoc employees till regularly selected candidates are made available by the Mandal. Many a time it is noticed that continuance of such ad hoc employees either by the State itself or under the orders of the Court gives rise to undue expectations in the mind of the ad hoc appointee and results into multiple litigations. If the State has decided not to continue the services of ad hoc employees, in accordance with the terms of appointment order, then there is no reason for which this request is to be accepted.

29. The learned senior counsel next submitted that earlier the State Government had resorted to similar scheme of fixed pay appointment in the matter of Vidya Sahayak and Shikshan Sahayak which was the subject matter of judicial scrutiny in Special Civil Application No.5218 of 1998 with Special Civil Application No.8610 of 1997 with Special Civil Application No.8193 of 1997 decided by this Court (Coram: N.N. Mathur, J.) by judgement and order dated 13th August 1998, so far as Vidya Sahayak is concerned. So far as Shikshan Sahayak is concerned, the same was under scrutiny in Special Civil Application No.10018 of 2002 decided by this Court (P.B. Majmudar, J.) vide judgement dated 23/24th July 2003.

These decisions are not to be considered at this stage, because this Court is not called upon to adjudicate and pronounce on any such scheme of the Government in this matter.

30. On behalf of the respondents, the learned Additional Advocate General made his submissions. The learned Additional Advocate General submitted that when specific agency/ authority is created and is assigned/ entrusted the work of recruitment it is always desirable that to attain the object of full transparency, that agency is

allowed to function and is allowed to make recruitment. He submitted that the State Government by its Resolution dated 27th July 1999 entrusted the entire work of selection and recruitment of candidates for technical and non technical cadres belonging to Class III to the Mandal. That being so the recruitment made by the State Government to meet the urgent, acute need of the day cannot be substituted as a regular recruitment. It was only ad hoc/ stop gap measure to meet the urgent/ acute requirement with a specific intimation in that regard to the appointees. He submitted that the appointees were informed about the nature of their appointment. They were told right from the beginning about the nature of their appointment, tenure of the appointment and also the contingency under which the appointment can be brought to an end, i.e. regularly selected candidate being made available by the Mandal.

The learned Additional Advocate General submitted that in fact the administrative instructions issued by the Government in the form of resolutions are in the nature of rules. He further submitted that these are in the nature of supplement to the recruitment rules framed under Article 309 of the Constitution of India and the same should be allowed to be enforced so as to have

consistency. He submitted that in the event the Government is allowed to follow those instructions/ rules scrupulously it will avoid arbitrariness and nepotism in the matter of appointment. In this regard he relied upon a decision of the Hon'ble the Apex Court in the matter of **A.P. Aggarwal Vs. Government of NCT of Delhi and another,** reported in (2000) 1 SCC 600. He has referred to paras 11, 12 & 15 of the said judgement, which are reproduced hereunder :

> "11. In our opinion, this is a case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore, it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. Even if it is to be said that the instructions contained in the office memorandum dated 14-5-1987 are discretionary and not mandatory, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also satisfy the

mandatory requirement of the statute. It is not therefore, open to the Government to ignore the panel which was already approved and accepted by it and resort to a fresh selection process without giving any proper reason for resorting to the same. It is not the case of the Government at any state that the appellant is not fit to occupy the post. No attempt was made before the Tribunal or before this Court to place any valid reason for ignoring the appellant and launching a fresh process of selection."

"12. It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us (vide Shrilekha Vidyarthi V. State of U.P.)."

"15. In Virender S. Hooda V. State of Haryana the Haryana Service Commission advertised 12 posts of the Haryana Civil Service (Executive Branch). On completion of selection final list was published. Some of

the selected candidates did not join and the appellant contended that they should have been considered against the vacancies so arising, depending upon the ranking obtained by the appellants in the competitive examination. They relied on government circulars dated 22.3.1957 and 26.5.1972 according to which the vacancies which arose within six months from receipt of recommendations of the Commission, should be filled up from the waiting list maintained by the Commission. The writ petition filed by the appellants was dismissed by the High Court in the view that the administrative instructions contained in the circulars could not be enforced. Reversing the decision of the High Court, the Division Bench of this Court observed that the Government ought to have considered the case of the appellants as per the rank obtained by them and the appellants had to be appointed if they came within the range of selection. The Bench pointed out that when those vacancies arose within a period of six months from the date of previous selection, the government circulars were attracted and the view of the

High Court that the vacancies arose after selection process commenced had no relevance and they are contrary to the declared policy of the Government. The Bench observed that the view taken by the High Court that the administrative instructions could not be enforced by the appellants would be looking at the matter from a narrow and wrong angle. The Bench said : (SCC p.699, para 4).

> “When a policy has been declared by the State as to the manner of filling up the post and that policy is declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rules, the respondents ought to follow the same.”

The ruling applies on all force to the facts of the present case.

The learned Additional Advocate General also relied upon a decision of the Hon'ble the Apex Court in the matter of

Jatinder Kumar Vs. State of Punjab, reported in (1985) 1 SCC 122. He referred to para 1 and 12 of the said judgement, which are reproduced hereunder:

> "1. The main question for consideration in this appeal by special leave is whether a person selected by the Subordinate Service Selection Board for direct appointment to the post of Assistant Sub Inspector of Police has got an unfettered right to be appointed on the basis of the recommendation made by the said Board."

> "12. The establishment of an independent body like Public Service Commission is to ensure selection of best available persons for appointment in a post to avoid arbitrariness and nepotism in the matter of appointment. It is constituted by persons of high ability, varied experience and of undisputed integrity and further assisted by experts on the subject. It is true that they are appointed by Government but once they are appointed their independence is secured by various previsions of the Constitution. Whenever the Government is required to make an appointment to a higher

public office it is required to consult the Public Service Commission. The selection has to be made by the Commission and the Government has to fill up the posts by appointing those selected and recommended by the Commission adhering to the order of merit in the list of candidates sent by the Public Service Commission. The selection by the Commission, however, is only a recommendation of the Commission and the final authority for appointment is the Government. The Government may accept the recommendation or may decline to accept the same. But if it chooses not to accept the recommendation of the Commission the Constitution enjoins the Government to place on the table of Legislative Assembly its reasons and report for doing so. Thus, the Government is made answerable to the House for any departure vide Article 323 of the Constitution. This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendations of the Commission. If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of

> merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz., bad conduct or character. The Government also cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus. We are supported in our view by the two earlier decisions of this Court in A.N. D'Silva V. Union of India and State of Haryana V. Subash Chander Marwaha. The contention of Mr.Anthony to the contrary cannot be accepted."

The submission of the learned Additional Advocate General deserves acceptance for the simple reason that arbitrariness and nepotism is the order of the day, more so, in the matter of recruitment to Government service. In such atmosphere if the Government comes out with a mechanism to avoid/ minimise arbitrariness and nepotism, such a step is a welcome step and is to be appreciated

by one and all. That being so it cannot be said that recruitment made by the Government is a substitute of recruitment by a regular agency/ authority. That being so the recruitment made by the Government remains to be a stop gap arrangement and cannot be ordered to be a substitute of the regular selection/ recruitment made by the regular agency.

31. The learned Additional Advocate General submitted that the appellant/ petitioners were appointed purely on ad hoc basis for a fixed tenure pursuant to the advertisement followed by selection by the Department. Appointment orders did contain this fact. That being so, the appellant/ petitioners are not entitled to a writ of mandamus either for regularisation or for continuance in service till a regularly selected candidate is made available by the Mandal. The learned Additional Advocate General submitted that when a party is before the Court, what is required to be established by the party is as to whether the party has any right to get the 'relief' as prayed for. He submitted that the appellant-petitioners do not have any right to get the 'relief' as prayed for. Therefore, these appeals and the petitions are required to be dismissed. In support of this submission, the learned Additional Advocate General relied upon a

decision of the Hon'ble the Apex Court in the matter of **U.S.P. Srivastava Vs. Vinoba Bhave University and others,** reported in (2001) 10 SCC 608. The learned Additional Advocate General referred to para 2 of the said judgement which is reproduced hereunder:

> "2. Mr.Mansih Ranjan, the learned counsel appearing for the appellant contended before us that subsection (10) of section 58 would only be prospective in nature and would apply to the appointments made on ad hoc basis subsequent to the insertion of the said subsection and since the appellant's appointment was prior thereto, subsection (10) would not apply. Mr.Saran, appearing for the University, on the other hand contended that even if the provisions of subsection (10) of section 58 are prospective in nature, but in respect of appointments which have not been approved by the Service Commission, the law would apply and therefore, the period of six months would apply to those cases also. Having examined the impugned provisions of the Act, we do not think that subsection (10) of section 58 wold apply to the appointments made prior thereto, namely, to the

appointments made earlier than 1993. But at the same time, when a person approaches a court for issuance of a mandamus, unless he establishes his right to the post, the court will not be entitled to issue any writ of mandamus. In view of the very nature of appointment, as indicated in the appointment order of the appellant, to the post of Reader and in view of section 58 as it stood even prior to the insertion of subsection (10) therein, an appointment to the post of Reader could be made only on the recommendation of the Service Commission. The terms of appointment in favour of the appellant also clearly indicate that the appointment is purely ad hoc and will cease to be effective if the Service Commission does not approve of the same. For seven long years, the Service Commission had not approved the appointment of the appellant to the post of Reader. In such circumstances the appellant cannot claim a right of continuance in the post of Reader and the Vice Chancellor would be well within his jurisdiction to terminate his services by passing the order particularly when the legislative mandate by insertion of subsection

(10) of section 58 had already become operational by that time. In that view of the matter, we are not inclined to interfere with the impugned order of the High Court. This appeal accordingly fails and is dismissed."

The learned Additional Advocate General submitted that a tall claim is made by the learned senior counsel appearing for the appellant-petitioners that they are continuing for a long time and therefore, their case should be considered for regular appointment. He submitted that the claim is based on untrue facts. He submitted that it was for the first time that after an advertisement was issued on 25th April 2001 that the appellant-petitioners were engaged as Class III para-medical staff as Junior Pharmacist on purely ad hoc basis for a period of one year or till regularly selected candidates by the Mandal are available. He submitted that the appellant and other similarly situated persons reported for duty on 12th April 2002 and when they were served with an order on 27th March 2003 stating that their services will be terminated on the expiry of period of ad hoc appointment effective from 12th April 2003, they approached this Court on 7th April 2003 and obtained order on 9th April 2003 for maintaining 'status quo' and by

virtue of that order they continued in service. That being so, it cannot be said that they are continued in service for a long time which must tilt the balance of equity in their favour. He submitted that thus, there is 'factual fallacy' in the submissions of the learned senior counsel. The learned Additional Advocate General submitted that even otherwise the settled legal position is that a person who is continued for a long time does not become entitled to a regularisation, unless his initial recruitment is regular. It is for the prescribed selection agency, under various provisions of recruitment rules including those of age and qualification which cannot be relaxed merely on the ground of continuous officiation as ad hoc appointee, unless recruitment rules expressly provide for such relaxation. He submitted that the claim of the appellant/ petitioners for regularisation on the ground of they having been continued for long time deserves to be rejected. In this regard the learned Additional Advocate General relied upon a decision of the Hon'ble the Apex Court in the matter of **J&K Public Service Commission and others Vs. Dr.Narinder Mohan and others**, reported in (1994) 2 SCC 630. He referred to paras 2, 7 and 11.

The learned Additional Advocate General relied upon a

decision of the Hon'ble the Apex Court in the matter of **Santosh Kumar Vs. G.R. Chawla**, reported in (2003) 10 SCC 513, particularly paras 3, 4, 13 and 18, which paras are reproduced hereunder:

> "3. The facts, in short, are as follows:-
>
> According to the appellants, they were eligible for appointment to the posts in question and the appointments were made on the basis of selection made pursuant to the public advertisement and after considering claims of all eligible candidates. In these circumstances, it was submitted that the entire length of service of the appellants is entitled to be considered for the purpose of seniority as held by the Constitution Bench of this Court in the case of Direct Recruit Class II Engineering Officers' Association s vs. State of Maharashtra and Others (1990) 2 SCC 715. However, the High Court held that ad hoc services cannot be counted for the purpose of seniority. It was further submitted that if the ad hoc appointment is made after satisfying all tests for regular appointment and after considering the claims of

all eligible candidates, these appointments must be treated as substantive appointments for the purpose of seniority and that the High Court fell in error in excluding such period from seniority."

"4. The High Court pronounced the impugned judgment whereby it was held that the appellants/writ petitioners who are ad hoc appointees are not entitled to claim seniority on the basis of continuous officiation. It was also held that the direct recruit appointees/respondents were, in fact, appointed on 16.09.1982 and the corrections were made in their appointment letters mala fide. The High Court also disbelieved the affidavit filed on behalf of the State Government and the Director of Medical Services. Accordingly, the High Court quashed the seniority list and directed preparation of fresh seniority list in accordance with the guidelines mentioned therein."

"13. On the point whether the appellants/writ

petitioners were entitled to the seniority from the date of their original initial appointment, the High Court observed as follows:-

"In the present case rule of the seniority clearly provides that seniority in any category or cadre post shall be determined from the date of the order of substantive appointment. The posts of Drug Inspectors was within the purview of Public Service Commission. But, ad-hoc appointments were made. The said ad-hoc appointments cannot be deemed to be the substantive appointments. It were in the nature of stop gap or fortuitous appointments, hence the period during which ad-hoc appointees worked, cannot be counted for the purposes of seniority."

“18. The common judgment passed by the High Court, in our view, does not call for any interference and all the appeals fail and are dismissed. However, there will be no order as to costs.”

The learned Additional Advocate General next relied upon

a decision of the Hon'ble the Apex Court in the matter of K.D. Vohra Vs. K.G. Patel, reported in 2003 (1)GLH 312, particularly paras 7, 17, 25 & 26.

The learned Additional Advocate General then relied upon a judgement of the Hon'ble the Apex court in the matter of **Bhanmati Tapubhai Muliya Vs. State of Gujarat**, reported in 1995 (2) GLH 228, particularly paras 6 & 8, which are reproduced hereunder :

> "6. With respect we are unable to agree with the decision in the aforesaid case of Mr.Bhojani. The reason for this is that it is now well settled that in the absence of statutory rules, the Government can make recruitment on the basis of administrative instructions. The draft recruitment rules are no different from administrative instructions. Secondly, the power of relaxation of a qualification is a discretionary power. The Government or the recruiting authority cannot be compelled to exercise this discretion when it chooses not to do so. In that case, ad hoc appointment was made because qualified Stenographer was not available. By directing

that relaxation should have been granted, the Court in effect, exercised the jurisdiction of the appointing authority which it could not do. In that case, the appointment was for a fixed period, upto 31st July 1984, as in the present case, and therefore, Shri Bhojani, like the appellant in the present case, had no right to continue after 31st of July 1984. It is difficult to accept that his appointment for a fixed period was in violation of any law or any Constitutional provision. The decision in M.P. Bhojani's case is not correct and we overrule the same."

"8. Another case, to which reference may usefully be made, is that of Dr.Arundhati Ajit Pargaonkar v. State of Maharashtra and another. JT 1994 (5) SC 378. In that case, the appellant was appointed after selection on 16th September 1978 and the letter of appointment stated that the appointment was "... on a purely temporary basis pending further orders as Lecturer in Dentistry at the B.J. Medical College, Pune from date of taking over charge ..." She worked for about 9 years and then, her services were

> terminated. The appellant sought regularisation of her services and it was observed by the Supreme Court that eligibility and continuous working for howsoever long period should not be permitted to overreach the law. The appellant was held not entitled to claim regularisation even though she had worked without break for 9 years."

In the earlier part of this judgement dates right from filing of the first petition and grant of interim relief by the learned Single Judge and thereafter by the Division Bench are set out in detail. It is also mentioned that the matter had reached the Hon'ble the Apex Court and orders were passed by the Hon'ble the Apex Court pursuant to which applications were filed and appropriate order was passed by this Court. From the aforesaid details it cannot be said in the present case that the appellant or any other similarly situated person was continued for a long time as an ad hoc appointee. In fact the submission in this regard by the learned senior counsel is not only misconceived, but to an extent misleading. The appellant-petitioner had reported for duty on 12th April 2002 and by order dated 27th March 2003 their services were terminated on expiry of period of

one year of ad hoc appointment, i.e. 12th April 2003. Thus, there was no question of continuing these petitioners/ appellants for a long time. Whatever time they have continued in service after serving of order dated 27th March 2003 was by virtue of order of this Court. It is well settled principle that orders of Court do not create equity in favour of a party and do not cause prejudice to the other. That being so, the submission of the learned Additional Advocate General warrants acceptance and is accordingly accepted.

32. Last but not the least the learned Additional Advocate General submitted that the claim for regularisation of ad hoc appointees on the ground that they had worked on the post in question for quite a long, factors like legitimate expectations, equity, sympathy or human approach do not have any role to play. He submitted that if these factors are taken into consideration and are allowed to play any role that will be at the cost of other candidates for the post, who could not get this opportunity to be an ad hoc appointee. In the present case this question does not arise as appointment was only for a period of one year and before that period could expire, an order of termination was passed. That order was challenged

before the Court. It was only by virtue of the order of the Court that the appellant-petitioners then continued as ad hoc appointees. In support of this submission the learned Additional Advocate General relied upon a decision in the matter of **State of MP Vs. Dharam Bir,** reported in (1998) 6 SCC 165, particularly paras 23 to 27 and 31.

The learned Additional Advocate General also relied upon a decision in the matter of **Dr.Chanchal Goyal (Mrs.) V. State of Rajasthan,** reported in (2003) 3 SCC 485, particularly paras 1, 2, 3, 4, 6, 7, 8, 9, and 23.

33. Besides the aforesaid aspects of the matter there is yet another important aspect of the matter. It is on record that the appellant and other similarly situated persons were appointed on purely ad hoc basis for a fixed term and thereafter their services were terminated by an order of termination to be effective from the date of the expiry of the term. Though the order is worded that the services of the appellant-petitioners and other similarly situated persons will stand terminated, it is in fact an act of disengagement. A similar question arose before the Hon'ble the Apex Court in the matter of

State of Gujarat & another Vs. Akshay Amrutlal Thakkar, reported in JT 2006 (1) SC 417.

In the matter before the Hon'ble the Supreme Court, orders of disengagement of the respondents, who were working as Home Guards and Home Commandants came up for consideration. The learned Single Judge in High Court was pleased to dismiss the writ petitions filed challenging the said orders of disengagement by the State. However, the Division Bench set aside the judgement and order of the learned Single Judge holding that Bombay Home Guard Rules, 1953 did not empower the Government to direct termination of the services of any member of the Home Guard or all the members of the Home Guards as was sought to be done by the impugned decision of the Government on 2nd December 1995. The Hon'ble the Apex Court was pleased to observe in para 10 as under:

> "As rightly contended by learned counsel for the appellant-State, the order impugned in the writ petition was one of disengagement because the respondents did not act in terms of the undertaking given. .. .. " (emphasis supplied)

In the present case the appellant and other similarly

situated persons were engaged to meet the urgent/ acute need of services of para-medical staff. It is on record that the staff was engaged for a fixed term and that factum was made known to every appointee and every appointee was asked to execute an undertaking. Before expiry of the term for which a person was engaged, he was disengaged. That being so, this decision of the Hon'ble the Apex Court squarely applies to the facts of this case as in substance the order of termination is nothing but an order of disengagement.

34. Similarly, in a matter before the Hon'ble the Apex court between **Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and others**, reported in A.I.R. 2006 SC 1165, a question arose as to whether employment under the Government is a matter of status and not a contract even though the acquisition of such a status may be preceded by a contract, on acceptance of an offer of appointment by the employee.

The Hon'ble the Apex Court was pleased to hold that the 'rights and obligations are not determined by the contract of the two parties, but by statutory rules which are framed by the Government in exercise of power conferred by Article 309 of the Constitution and the

service rules can be unilaterally altered by the rule making authority, namely, the Government.'

35. The facts of the case before the Hon'ble the Apex Court were, 'the respondent was engaged or hired on contract to work as Drugs Inspector for a period of six months from the date of joining or till a candidate selected by UPSC joined on regular basis, whichever is earlier. The contract further stipulated that even if a regularly selected candidate did not join, the respondent shall stand relieved on the expiry of six months.'
In these facts the Hon'ble the Apex Court helt that, 'the respondent did not have any right to continue as Drugs Inspector after expiry of six month period for which he had been appointed.' The Hon'ble the Apex Court held as aforesaid because in the case before the Hon'ble the Apex Court, 'it was neither pleaded nor there was any material to show that the appointment of the respondent was made after issuing public advertisement or the body authorised under the relevant rules governing the conditions of service of Drugs Inspectors in the Union Territory of Daman and Diu had selected him.' (emphasis supplied)

Even at the cost of repetitioin it is to be reiterated that in the case on hand it is on record that the

Government only with a view to meet the acute and urgent need of para-medical staff had, as an exception, resorted to engaging/ appointing on ad hoc basis. The appointment was given for a fixed period and before expiry of that period, an order of termination or as is termed by the Hon'ble the Apex Court in the matter of **State of Gujarat & another Vs. Akhasy Amrutlal Thakkar** (supra) an order of disengagement was issued. That being so this decision of the Hon'ble the Apex Court also applies with full force.

36. Having considered the rival submissions of the parties and having considered the documents produced on record, this Court is of the opinion that the appellant-petitioners have not made out any case for grant of any relief to them other than the one already granted by the learned Single Judge.

37. In the result the Letters Patent Appeals are dismissed, but however, the Special Civil Applications are partly allowed to the extent indicated hereinabove. The Civil Application is disposed of. Rule/notice in the respective matters stand discharged. No order as to costs.

(R.S.GARG, J.)

(RAVI R.TRIPATHI, J.)

karim